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## Civil Procedure

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## **LIMITATIONS ON THE TOLLING STATUTE: A TEMPORARY SOLUTION FOR A MORE PERMANENT PROBLEM IN SOUTH CAROLINA**

### **I. INTRODUCTION**

You are the attorney for the defendant in an action where the plaintiff is your client's ex-wife, and both are residents of the same state. Your client leaves the state permanently, but the plaintiff knows your client's address and could therefore locate him for purposes of serving process. The plaintiff waits to file her claim until after the limitations period runs, but she is still permitted to file because the limitations period was tolled by state law during your client's absence from the state. In fact, the plaintiff could have waited for an indefinite period of time before filing, all the while knowing how to locate your client. Until recently, this was the interpretation given to South Carolina's tolling statute under these circumstances.<sup>1</sup>

South Carolina currently has a statute that tolls the limitations period for commencement of an action against a defendant who is absent from the state for one year or more.<sup>2</sup> Statutes of this kind are common and rational. They prevent a limitations period from running against a party who is unable to bring a particular defendant under the court's jurisdiction.<sup>3</sup> When state court jurisdiction was more limited, tolling statutes served a very useful purpose. However, recent extensions of state court jurisdictions have made tolling statutes less necessary.

A majority of jurisdictions have amended, or at least judicially construed, their tolling statutes to prevent their application when out-of-state defendants<sup>4</sup> are amenable to personal service of process and can be brought within the personal jurisdiction of the court.<sup>5</sup> Until recently, South Carolina remained in the minority of states that applied their tolling statutes to out-of-

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1. See *Meyer v. Paschal*, 330 S.C. 175, 184, 498 S.E.2d 635, 639 (1998) (finding the tolling statute inapplicable under these facts).

2. S.C. CODE ANN. § 15-3-30 (Law. Co-op. 1976).

3. See *Burrows v. French*, 34 S.C. 165, 168, 13 S.E. 355, 356 (1891).

4. For clarity the terms "absent defendants" and "out-of-state defendants" are used interchangeably. The phrase "absent defendants" refers to residents that simply leave the state for a period of time, while "out-of-state defendants" refers to persons that reside outside of the state. However, the distinction serves no purpose for this discussion because it appears that section 15-3-30 of the Code of Laws of South Carolina applies to both groups of defendants. *Id.* at 168, 13 S.E. at 356.

5. See discussion *infra* Part III.B.

state defendants even though these defendants were amenable to service of process.<sup>6</sup>

In *Meyer v. Paschal*<sup>7</sup> the South Carolina Supreme Court brought the state into the majority of jurisdictions that prevent a tolling statute's application when out-of-state defendants are amenable to service and can be brought within the state's personal jurisdiction. While the holding may logically follow the progression of personal jurisdiction and also make good common sense, a few problems remain.<sup>8</sup> For example, the holding is limited to "situations similar to [Meyer] in which the name and location of the defendant is known to the plaintiff."<sup>9</sup> Additionally, "[w]hether the plaintiff had such knowledge could conceivably be a question of fact."<sup>10</sup> These questions would seem to invite more litigation to determine whether a plaintiff did, in fact, possess such knowledge. Also in question are situations where a plaintiff could have or should have known the information. The decision provides no guidance for determining when a plaintiff could have or should have accessed the defendant's name and location. These and other problems could potentially be solved by the adoption of the federal rule governing time for commencement of actions.<sup>11</sup> Other state rules offer alternatives as well.<sup>12</sup>

Part II of this Note reviews *Meyer* and discusses the current state of South Carolina jurisprudence regarding tolling the statute of limitations for actions against out-of-state defendants. Part III reviews the history of the South Carolina tolling statute, helping place the *Meyer* decision in its proper context. Part IV discusses the ramifications of the *Meyer* holding and some potential problems it may elicit. Finally, Part V offers alternatives to the system currently in effect for serving process on and obtaining jurisdiction over absent defendants.

## II. *MEYER V. PASCHAL*

In *Meyer* the South Carolina Supreme Court affirmed the trial court's order dismissing the plaintiff's claim as time barred.<sup>13</sup> The plaintiff, Meyer, and the defendant, Paschal, were divorced after a twenty-three-year marriage.<sup>14</sup> Under the terms of a separation agreement, Paschal purchased a home in South Carolina in 1982 for Meyer to occupy as her residence.<sup>15</sup> Paschal deeded the

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6. See, e.g., *Cutino v. Ramsey*, 285 S.C. 74, 76-77, 328 S.E.2d 72, 73 (1985); *Harris v. Dunlap*, 285 S.C. 226, 228, 328 S.E.2d 908, 909 (1985).

7. 330 S.C. 175, 498 S.E.2d 635 (1998).

8. See *infra* Part IV.

9. *Meyer*, 330 S.C. at 184, 498 S.E.2d. at 639.

10. *Id.*

11. FED. R. CIV. P. 4(m); see *infra* Part V.

12. See *infra* Part V.

13. 330 S.C. at 176, 498 S.E.2d at 635.

14. *Id.*

15. *Id.*

property, which was titled in Paschal's name, to his sister in 1985.<sup>16</sup> Meyer knew of this transaction in 1986, the alleged time of the accrual of any cause of action.<sup>17</sup> From the time of this transfer until Meyer commenced the suit, Meyer knew of Paschal's and his sister's whereabouts, and Meyer continued to occupy the house with no apparent change in conditions.<sup>18</sup>

Divorce proceedings in New Jersey led to a 1991 order, issued by the New Jersey Superior court, directing Paschal to convey the house and lot to Meyer.<sup>19</sup> However, Paschal's sister, the new owner of the property, was not made a party to the New Jersey divorce proceedings.<sup>20</sup> Meyer brought suit in South Carolina in 1994 attempting to domesticate the New Jersey order.<sup>21</sup> Part of the suit involved a fraudulent conveyance claim against Paschal and his sister under sections 27-23-10 and 27-23-20<sup>22</sup> of the Code of Laws of South Carolina.<sup>23</sup> The trial court dismissed this claim with prejudice<sup>24</sup> because the six-year statute of limitations for this cause of action had expired.<sup>25</sup> Meyer admitted over six years had passed since she had notice of the conveyance, but she argued that section 15-3-30 operated to toll the statute of limitations when both defendants were non-residents.<sup>26</sup> Section 15-3-30 provides:

If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms in this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside out of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.<sup>27</sup>

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16. *Id.* at 176-77, 498 S.E.2d at 635-36.

17. *Id.* at 177, 498 S.E.2d at 636.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. See S.C. CODE ANN. § 27-23-10, -20 (Law. Co-op. 1976).

23. *Meyer*, 330 S.C. at 177, 498 S.E.2d at 636.

24. *Id.*

25. See S.C. CODE ANN. § 15-3-530(7) (Law. Co-op. 1976) (providing six-year limitations period for fraud claims). Claims accruing after April 5, 1988 are subject to a new three-year limitations period. *Id.* (Law. Co-op. Supp. 1998).

26. See *Meyer*, 330 S.C. at 177, 498 S.E.2d at 636.

27. S.C. CODE ANN. § 15-3-30.

Meyer's argument depended upon the court's strict interpretation of the statute and its plain meaning, a view that South Carolina courts have taken since the statute's adoption.<sup>28</sup> Two cases decided in 1985 expressly ruled that the tolling statute still applied to out-of-state defendants who were amenable to service of process and who could be brought under the state's jurisdiction.<sup>29</sup>

In *Meyer* the South Carolina Supreme Court analyzed the historical purposes of the statute and its apparent conflict with its plain meaning.<sup>30</sup> Finding that the statutory language referring to a defendant who is out-of-state means "a defendant who is beyond the personal jurisdiction and process of the court and not simply a defendant who is physically absent from the State,"<sup>31</sup> the court affirmed the lower court's decision barring the plaintiff's suit because the limitations period had expired. The *Meyer* court cited other jurisdictions subscribing to this majority view<sup>32</sup> and noted that such a ruling harmonized the purpose of the tolling statute with the purposes of the long-arm, substitute service, and limitations period statutes.<sup>33</sup>

Whereas the court of appeals three months earlier declined to tread on what it considered to be legislative ground,<sup>34</sup> the supreme court definitively held the tolling statute inapplicable when the non-resident defendant is amenable to personal service of process and can be brought within the personal jurisdiction of South Carolina courts.<sup>35</sup> However, the court limited its holding to "situations similar to the instant case in which the name and location of the defendant [are] known to the plaintiff."<sup>36</sup> Because Meyer knew the name and location of the defendants who were at all times amenable to service, the tolling statute did not apply, and the suit was barred by the statute of limitations.

### III. BACKGROUND

#### A. South Carolina

The South Carolina Supreme Court's decision in *Meyer* was a surprising reversal of jurisprudence even in light of recent decisions interpreting the tolling statute. For some time before the ruling, South Carolina

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28. See generally Robert H. Putnam, Jr., Note, *Statutes of Limitations Told Against Out-of-State Defendants Regardless of Availability of Other Methods of Service*, 38 S.C. L. REV. 158 (1986) (discussing cases *infra* note 29 and other interpretations of tolling statute).

29. *Cutino v. Ramsey*, 285 S.C. 74, 77, 328 S.E.2d 72, 73 (1985); *Harris v. Dunlap*, 285 S.C. 226, 228, 328 S.E.2d 908, 909 (1985).

30. 330 S.C. at 178-84, 498 S.E.2d at 637-39.

31. *Id.* at 182, 498 S.E.2d at 638-39.

32. *Id.* at 182-83, 498 S.E.2d at 639.

33. *Id.* at 183, 498 S.E.2d at 639.

34. *Tiralango v. Balfry*, 329 S.C. 228, 231, 495 S.E.2d 234, 236 (Ct. App. 1997), *cert. granted*, No. 2766, Shealy Adv. Sh. No. 31 at 2 (S.C. Sept. 19, 1998).

35. *Meyer*, 330 S.C. at 184, 498 S.E.2d at 639.

36. *Id.*

courts had carved out exceptions to the tolling statute's application,<sup>37</sup> but the holdings in *Cutino v. Ramsey*<sup>38</sup> and *Harris v. Dunlap*<sup>39</sup> had remained largely intact. For example, the court held in 1993 that section 15-3-30 did not operate to toll the statute of repose for medical malpractice actions.<sup>40</sup> Other decisions more directly limited the tolling statute's application. In *Dandy v. American Laundry Machinery, Inc.*<sup>41</sup> the South Carolina Supreme Court created another narrow exception to the tolling statute. The plaintiff in *Dandy* attempted to serve an out-of-state defendant corporation by mailing the summons and complaint to the defendant's registered agent.<sup>42</sup> The defendant received the summons and complaint after the applicable statute of limitations had expired,<sup>43</sup> but Dandy argued that section 15-3-30 applied to toll the statute of limitations.<sup>44</sup> The court recognized that the main purpose of the tolling statute was to remedy the problem of locating an out-of-state defendant before the expiration of the limitations period.<sup>45</sup> However, this problem does not exist when a corporation has a registered agent in South Carolina, as was apparently the case in *Dandy*.<sup>46</sup> Therefore, the court ruled that section 15-3-30 did not apply to toll the statute of limitations in an action against a foreign corporation with a registered agent in the state.<sup>47</sup>

The federal courts have also rendered decisions limiting the tolling statute's application. In *Catawba Indian Tribe v. South Carolina*<sup>48</sup> the Fourth Circuit Court of Appeals relied on reasoning similar to the court's in *Langley v. Pierce*<sup>49</sup> in deciding the tolling statute was not effective in adverse possession cases because of a separate statutory scheme authorizing service by publication.<sup>50</sup> Because the scheme provided for service upon the out-of-state defendant, the problem of locating an out-of-state defendant was not present.<sup>51</sup>

In *Guyton v. J.M. Manufacturing, Inc.*<sup>52</sup> the United States District

37. See *infra* notes 40-47 and accompanying text.

38. 285 S.C. 74, 77, 328 S.E.2d 72, 73 (1985) (holding that the limitations period is tolled even though an out-of-state defendant is amenable to substituted service of process).

39. 285 S.C. 226, 228, 328 S.E.2d 908, 909 (1985) (holding that the limitations period is tolled even though the long-arm statute allows a plaintiff to obtain personal jurisdiction over an out-of-state defendant).

40. *Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) (holding that the statute provided its own limited tolling provision); see S.C. CODE ANN. § 15-3-545(D) (Law. Co-op. Supp. 1998).

41. 301 S.C. 24, 389 S.E.2d 866 (1990).

42. *Id.* at 26, 389 S.E.2d at 867.

43. *Id.*

44. *Id.* at 27, 389 S.E.2d at 868.

45. *Id.*

46. *Id.*

47. *Id.*

48. 978 F.2d 1334 (4th Cir. 1992).

49. 313 S.C. 401, 438 S.E.2d 242 (1993).

50. *Catawba*, 978 F.2d at 1348-49.

51. *Id.*

52. 894 F. Supp. 252 (D.S.C. 1995).

Court for the District of South Carolina went one step further, ruling that section 15-3-30 was unconstitutional as an impermissible burden on interstate commerce.<sup>53</sup> The court explained that, after the ruling in *Dandy*,<sup>54</sup> a foreign corporation must appoint a registered agent in South Carolina in order to receive the protection of the statute of limitations.<sup>55</sup> Forcing a corporation to appoint a registered agent and subject itself to the general jurisdiction of the state, the court reasoned, violated the Commerce Clause by creating too heavy a burden on the corporation.<sup>56</sup>

## B. Other Jurisdictions

### 1. Majority Approach

Most jurisdictions addressing the specific question of whether a tolling statute applies even when a non-resident defendant remains amenable to service of process have decided that the tolling statute does not operate to toll the statute of limitations during the period of absence or nonresidence.<sup>57</sup> A number of theories have been advanced to support the majority position.

Some courts have reasoned that tolling the statute of limitations when a defendant is amenable to service of process would conflict with the purpose of the long-arm statute, which is to expedite litigation even though a defendant is not present in the state.<sup>58</sup> Some have also emphasized that tolling the statute of limitations under these circumstances defeats the purpose of the statute of limitations itself by allowing a plaintiff to postpone commencing an action

53. *Id.* at 254-55; *see also* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 891 (1988) (striking down an Ohio tolling statute almost identical to South Carolina's tolling statute because the burden imposed on interstate commerce by the statute exceeded any local interest advanced by it).

54. *See supra* notes 40-47 and accompanying text.

55. *Guyton*, 894 F. Supp. at 254.

56. *Id.*

57. *See generally* Kenneth J. Rampino, Annotation, *Tolling of Statute of Limitations During Absence from State as Affected by Fact That Party Claiming Benefit of Limitations Remained Subject to Service During Absence Or Nonresidence*, 55 A.L.R.3d 1158 (1974 & Supp. 1998) (analyzing various state tolling provisions and the interpretations given to them when absent defendants remained subject to service); 51 AM. JUR. 2D *Limitation of Actions* §§ 154-69 (1970 & Supp. 1998) (considering tolling statutes and the effects of a defendant's nonresidence or absence from the jurisdiction).

58. *See, e.g.,* Summerise v. Stephens, 454 P.2d 224, 227 (Wash. 1969) ("[T]he tolling provision in such cases is no longer necessary, and the statute of limitations should again be permitted to perform its purpose of expediting litigation."); *Bergman v. Turpin*, 145 S.E.2d 135, 138 (Va. 1965) ("[T]he primary purpose of the nonresident motorist act is to afford a speedy adjudication of the rights of the parties."); *Law's Adm'r v. Culver*, 155 A.2d 855, 858 (Vt. 1959) ("[T]o hold the contrary would conflict with the primary purpose of [the long-arm statute], namely the speedy adjudication of the respective rights of the parties in cases to which it applies.").

when the claim could otherwise be advanced.<sup>59</sup> Permitting plaintiffs to postpone does not further the intended purpose of preventing claims from growing stale. Other courts holding the majority view have emphasized the injustice presented to defendants in these situations. Allowing plaintiffs to postpone actions indefinitely prevents defendants from fully establishing all of their available defenses.<sup>60</sup> Further, it may place some defendants and their rights at a lower level of protection than other defendants and their rights. In other words, out-of-state defendants amenable to service of process would not be protected by the statute of limitations, but in-state defendants would still have this protection.

## 2. *Minority Approach*

A limited number of jurisdictions still hold the minority view that a nonresident's amenability to service of process does not necessarily render the tolling statute inapplicable.<sup>61</sup> Courts adopting this view have chosen to give tolling statutes a strict, literal interpretation, finding that tolling and long-arm statutes are not mutually exclusive remedies, but are simply alternative methods of service.<sup>62</sup> Often these courts are hesitant to perform what some perceive as a legislative function.<sup>63</sup> One court has stated that the legislature should be responsible for curing any defects in a tolling statute.<sup>64</sup>

59. See, e.g., *Byrne v. Ogle*, 488 P.2d 716, 718 (Alaska 1971) ("To apply the tolling statute to a situation where the defendant is at all times amenable to service is repugnant to the general purposes of statutes of limitations.").

60. See, e.g., *id.* at 719 ("[A] defendant might not know until years had passed that he was charged with liability for negligence."); *Jarchow v. Eder*, 433 P.2d 942, 946 (Okla. 1967) ("To permit the plaintiff in a case such as this to defer the commencement of his cause of action for an indefinite period of time, when there is continuously open to him the right to commence a personal action against the defendant, would frequently result in hardship to the defendant, who might often be completely unaware of his position of peril.").

61. See, e.g., *Vaughn v. Deitz*, 430 S.W.2d 487, 489 (Tex. 1968) (holding that the tolling statute is still valid despite the availability of substituted service statute).

62. See, e.g., *Couts v. Rose*, 90 N.E.2d 139, 141 (Ohio 1950) ("[The long-arm statute gives a plaintiff] an option to proceed at once against the allegedly culpable person remaining out of the state, or to defer such procedure until he returns to the state, when the statute will again begin to run by virtue of the provisions of [the tolling statute].").

63. See, e.g., *Tiralongo v. Balfry*, 329 S.C. 228, 231, 495 S.E.2d 234, 236 (Ct. App. 1997) ("However compelling Respondent's argument may be, we refuse to tread on legislative ground."), *cert. granted*, No. 2766. Shealy Adv. Sh. No. 31 at 2 (S.C. Sept. 19, 1998); *Bode v. Flynn*, 252 N.W. 284, 286 (Wis. 1934) ("The Legislature could, had it seen fit, have amended the statute . . . so as to cover persons and all other corporations when a person representing them resided in the state upon whom service might be procured, but it has never done so.").

64. *Duke Univ. v. Chestnut*, 221 S.E.2d 895, 898 (N.C. Ct. App. 1976); see Reginald Combs, Note, *Tolled Statute of Limitations v. Long-Arm Statute Amenability*, 12 WAKE FOREST L. REV. 1041 (1976). The North Carolina Legislature responded to the court's suggestion by amending its tolling statute. N.C. GEN. STAT. § 1-21 (1996) ("The provisions of this section shall not apply to the extent that a court of this state has or continues to have jurisdiction over the person . . .").



## IV. ANALYSIS

The court in *Meyer* expressly limited its holding to situations where the “name and location of the defendant [are] known to the plaintiff.”<sup>65</sup> The court went on to explain that “[w]hether the plaintiff had such knowledge could conceivably be a question of fact.”<sup>66</sup> With this language, the ruling elicits a few interesting problems. First, the holding may spawn more litigation in a society and legal system already overburdened and frustrated. Because the plaintiff’s knowledge may be a question of fact, every defendant will argue that he was available to be served, so attorneys must prepare to argue an additional factual issue before the court to determine whether the plaintiff possessed such knowledge. Also, by making the plaintiff’s knowledge relevant, this knowledge must be inferred from other actions, which will require more discovery devoted to this issue.

The United States District Court for the District of South Carolina has already encountered the problems arising from situations where the plaintiff does not know the defendant’s name and address, but could or should know this information.<sup>67</sup> Recognizing that *Meyer* failed to address this question, the district court interpreted the decision to include situations where “the name and location of the defendant [are] not known to [the] plaintiff and is not able to be discovered by reasonable methods before the statute of limitations runs.”<sup>68</sup>

An additional, related problem is that if a plaintiff does not receive the tolling statute’s protection after the plaintiff discovers the defendant’s name and location, some of the incentive to locate an out-of-state defendant may be lost on those plaintiffs who would take advantage of a tolling statute by postponing claims for no good purpose. Although in most situations the plaintiff would want to locate a defendant as soon as possible, occasionally a plaintiff could benefit from allowing a claim to become stale. If the purpose of the long-arm statute, substitute service statute, and statute of limitations is to adjudicate claims expeditiously, and if this purpose is to be harmonized with the tolling statute’s purposes,<sup>69</sup> permitting the tolling of the statute of limitations when a defendant’s name and address are unknown may in some situations defeat the statute’s purposes by removing the plaintiff’s incentive to locate defendants.

## V. ALTERNATIVES

The problems *Meyer* presents may be indicative of the greater trouble in South Carolina’s methods for commencing an action and for service of

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65. *Meyer v. Paschal*, 330 S.C. 175, 184, 498 S.E.2d 635, 639 (1998).

66. *Id.*

67. *See Alday v. Tecphy Div. Firminy*, 10 F. Supp. 2d 562 (D.S.C. 1998).

68. *Id.* at 565.

69. *See Meyer*, 330 S.C. at 183, 498 S.E.2d at 639.

process.<sup>70</sup> A few changes to the procedural rules could potentially eliminate altogether the need for a separate tolling statute. Other jurisdictions may offer insight.

Under the federal rules, the filing of the complaint tolls the statute of limitations.<sup>71</sup> A plaintiff then has 120 days to effect service upon the defendant.<sup>72</sup> If the plaintiff fails to accomplish this service, the court “shall dismiss the action without prejudice . . . provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.”<sup>73</sup> Therefore, a plaintiff must be persistent in attempting to effect service. If a plaintiff is unable to effect service and has been diligent in his efforts to do so, he may move to enlarge time,<sup>74</sup> and “[a] court would undoubtedly permit such a plaintiff additional time within which to effect service.”<sup>75</sup> This rule is consistent with the purposes of the statute of limitations because it encourages plaintiffs to pursue their claims diligently and, in fact, punishes them if they do not. However, at the same time it allows for an extension of time in those situations where a plaintiff has been unable to locate a defendant, but has made every effort to do so. Those who may be concerned about the burden placed upon plaintiffs by such a rule could be appeased by an alteration in the wording of the rule to read “the court . . . *may* dismiss” instead of “*shall* dismiss” to allow discretion.<sup>76</sup>

Adoption of the federal rule would also eliminate a procedure in South Carolina that has proven to be problematic. South Carolina Rule of Civil Procedure 3(b) provides for the tolling of a limitations period by delivering the summons and complaint to the sheriff of the county in which the defendant usually resides or last resided.<sup>77</sup> Courts have been forced to deal with questions such as whether a private investigator is analogous to a sheriff for purposes of tolling<sup>78</sup> and whether service to a sheriff on the weekend extends the statute of limitations to the next work day.<sup>79</sup> The federal approach is a more simple procedure and is one that forces a plaintiff to make either a diligent effort to

70. See S.C. R. Civ. P. 3(a) and 4.

71. FED. R. Civ. P. 3. *But see* S.C. R. Civ. P. 3(a) (“A civil action is commenced by filing and service of a summons and complaint.”).

72. FED. R. Civ. P. 4(m).

73. *Id.*

74. See FED. R. Civ. P. 6(b).

75. FED. R. Civ. P. 4 legislative statement.

76. See FED. R. Civ. P. 4(m).

77. S.C. R. Civ. P. 3(b). Rule 3(b) replaced an earlier statute. See S.C. CODE ANN. § 15-3-10 (Law. Co-op. 1976), *repealed by* 1985 Act No. 100, § 2 (effective July 1, 1995) (providing for delivery “to the sheriff or other officer”) (emphasis added).

78. See *Able v. Schweitzer*, 300 S.C. 321, 323, 387 S.E.2d 697, 698 (Ct. App. 1989) (holding that delivery of summons and complaint to a private investigator does not toll the statute of limitations).

79. See *Creech v. N.T.D. Indus., Inc.*, 815 F. Supp. 165, 171 (D.S.C. 1993) (holding that delivery of process to the sheriff on Saturday or Sunday extends the statute of limitations to the next work day).

serve an absent defendant or show the court good cause for failure to do so. The limitations period would automatically toll upon filing the complaint, thus eliminating both the need for serving the sheriff and the difficulties associated with the procedure.

Although actual service is the preferred method of service, publication is an option when a defendant cannot be found after a diligent search. South Carolina's statute allows service by publication in a limited number of situations,<sup>80</sup> but a more liberal publication rule, such as the one used in North Carolina,<sup>81</sup> would allow plaintiffs to serve defendants more effectively, lessening the need for a tolling provision. North Carolina allows an out-of-state party who cannot be served personally after due diligence to be served by publication "in

80. *See* S.C. CODE ANN. § 15-9-710(a) (Law. Co-op. Supp. 1998). Section 15-9-710(a) allows for service by publication under the following circumstances:

(1) when the defendant is a foreign corporation and has property within the State or the cause of action arose therein;

(2) when the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors or to avoid the service of a summons or keeps himself concealed therein with like intent;

(3) when the defendant is a resident of this State and after a diligent search cannot be found;

(4) when the defendant is not a resident of this State but has property therein and the court has jurisdiction of the subject of the action;

(5) when the subject of the action is real or personal property in this State and the defendant has or claims a lien or interest, actual or contingent, therein or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein;

(6) when the defendant is a party to an adoption proceeding and is either a nonresident or a person upon whom service cannot be had within the State after due diligence;

(7) when the defendant is a party to a proceeding for the determination of parental rights and is either a nonresident or a person upon whom service cannot be had within the State after due diligence; and

(8) when the defendant is a party to an annulment proceeding or where the subject of the matter involves the custody of minor children, support of minor children or wife, separate maintenance, or a legal separation.

*Id.*; *see also id.* § 15-9-720 (Law. Co-op. 1976) (service by publication in certain cases affecting real estate in South Carolina).

81. *See* N.C. R. CIV. P. 4(j1).

a newspaper circulated in the county where the action is pending.”<sup>82</sup> This can be done only when there is no reliable information regarding the location of the party to be served,<sup>83</sup> precisely the situation where a tolling statute would otherwise be useful.<sup>84</sup> The *Meyer* holding still permits tolling in South Carolina when the name *and* location of the defendant is unknown to the plaintiff.<sup>85</sup> The holding may also be limited to amenability to *personal* service of process, implying that service by publication would be inadequate to escape the tolling statute’s application.<sup>86</sup>

## VI. CONCLUSION

By deciding the state’s tolling statute does not apply when defendants are amenable to service of process and plaintiffs know the name and location of defendants, the South Carolina Supreme Court has found a temporary solution to a permanent problem. Limiting the tolling statute helps prevent inequity in certain situations, but doing so exposes other potential problems. Solving this dilemma ultimately should be a legislative function. Until then, the judiciary must rely on the *Meyer* decision and the potential difficulties that may accompany it. The South Carolina General Assembly should seriously consider adopting parts of the federal rule or rules from other states regarding service of process and commencing actions. Measuring the time for commencing an action from the date of filing would be a first step in the right direction. If the federal approach is not adopted, the General Assembly should at least consider a publication rule similar to North Carolina’s for serving process on out-of-state defendants. Adoption of these rules would virtually eliminate the need for a tolling statute and the controversies that accompany it.

*Stephen R. Smoak*

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82. *Id.* But see *Montgomery v. Mullins*, 325 S.C. 500, 505, 480 S.E.2d 467, 470 (Ct. App. 1997) (“Service of process by publication is authorized by S.C. CODE ANN. § 15-9-710(3) (Supp. 1995) where the defendant is a resident of this state, but after a diligent search cannot be found in this state.”).

83. N.C. R. Civ. P. 4 (j1).

84. See, e.g., *Tierney v. Garrard*, 477 S.E.2d 73, 76 (N.C. Ct. App. 1996) (ruling that exemption from tolling provision for a defendant amenable to service of process was not limited to *personal* service so that plaintiff could not use tolling provision even if defendant’s location was unknown because service by publication was available); see N.C. GEN. STAT. § 1-21 (1996).

85. *Meyer v. Paschal*, 330 S.C. 175, 184, 498 S.E.2d 635, 639 (1998).

86. See *id.*

